

1 TATYANA LITVINOVA,

2 Plaintiff,

3 v.

4 THE CITY AND COUNTY OF SAN  
5 FRANCISCO,

6 Defendant.

7 Case No. 18-cv-01494-RS

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12 **ORDER GRANTING DEFENDANT'S  
13 MOTION FOR SUMMARY  
14 JUDGMENT**15 Plaintiffs in this collective action are dual-status nurses employed by the City and County  
16 of San Francisco ("the City"). Plaintiffs sued the City for failure to pay overtime wages under the  
17 Fair Labor Standards Act ("FLSA"). In a prior order, Plaintiffs' counsel was sanctioned for willful  
18 failure to comply with discovery obligations and court-imposed deadlines. *See* Dkt. 180. The  
19 sanctions order significantly limited the universe of evidence available to Plaintiffs and ordered  
20 certain key facts established for the City. *See id.* Plaintiffs' motion for reconsideration was denied.  
21 *See* Dkt. 205.22 The evidentiary consequences of the sanctions order makes summary judgment for the  
23 City appropriate. Plaintiffs are unable to offer any evidence establishing that the City denied them  
24 the opportunity to work their scheduled hours, making Plaintiffs bona fide professionals under the  
25 FLSA's implementing regulations and disqualifying them from the FLSA's overtime protections.  
26 The grant of summary judgment to the City moots the City's motions for exclusion of Plaintiffs'  
27 expert and for decertification of the collective action. *See* Dkt. 196, 198.

## 1 I. BACKGROUND

2 The factual and procedural history of this case has been recounted at length in other orders,  
3 and in a published decision of the Ninth Circuit, *see Silloway v. City and County of San Francisco*,  
4 117 F.4th 1070, 1072–78, so only the crucial details are recited here. Plaintiffs are staff nurses  
5 employed by the City. Staff nurses work in shifts scheduled by the City, and their compensation  
6 for that work is determined through negotiations between the City and the nurses' union. These  
7 nurses also work so-called "per-diem" shifts, which are voluntary shifts the City fills on an as-  
8 needed basis to cover staffing shortfalls in its health facilities. Per-diem shifts command an hourly  
9 wage equal to 125% of the hourly rate implied by the salary negotiated between the City and the  
10 nurses' union. The crux of Plaintiffs' compliant is that the FLSA obligates the City to pay its  
11 nurses 150%, not 125%, of that implied hourly rate whenever a nurse's decision to pick up per-  
12 diem shifts causes her to work more than 40 hours in a week.

13 The City has asserted an affirmative defense. Under the FLSA, an employer is exempt  
14 from overtime requirements if the employee is a bona fide professional. *See* 29 U.S.C. § 213(a).  
15 The regulations set out two requirements for an employee to be considered a bona fide  
16 professional, *see id.* § 541.300, but only one is at issue here: whether the Plaintiffs were actually  
17 compensated on a salary basis, *see id.* That question turns on whether the City guaranteed the  
18 Plaintiffs the opportunity to work all of the hours that correspond to their employment status. For  
19 instance, for the City to win, it must show that it guaranteed all full-time nurses the opportunity to  
20 work 40 hours in a week. Nurses that agreed to work a particular fraction of full-time status must  
21 have been guaranteed the ability to work that fraction of 40 hours per week.

22 That does not mean that the Plaintiffs must have actually worked the hours they were  
23 entitled to work. The regulations permit the City to reduce a nurse's compensation where she (1)  
24 "is absent from work for one or more full days for personal reasons, other than sickness or  
25 disability," or (2) where she is absent "for personal reasons or because of injury or illness" for less  
26 than one full day. *See* 29 C.F.R. §§ 541.602(b), 541.710. Put simply, the City must give Plaintiffs  
27 the chance to work all their hours, and any deductions for time not worked must be solely caused

1 by the Plaintiffs.

2 Summary judgment was previously granted to the City on this affirmative defense. *See*  
3 Dkt. 103. That decision was reversed by the Ninth Circuit. *See Sillway*, 117 F.4th at 1088. The  
4 panel homed in on the City's expert report, which was prepared by Dr. Hossein Borhani. *See id.* at  
5 1082. That report reviewed the payroll records of 26 opt-in nurses across this case and the related  
6 *Sillway* case. *See id.* Though it found the City permitted the nurses to work their full-time  
7 equivalent hours in nearly 97% of pay periods, the panel identified 72 pay periods (3.2% of the  
8 total analyzed) in which there was an unexplained shortfall between the nurse's full-time  
9 equivalent hours and the hours accounted for on her pay check.

10 On remand, the City attempted to account for those discrepancies. It engaged in discovery,  
11 serving interrogatories and requests for production on the Plaintiffs in an attempt to discern which  
12 nurses were denied the opportunity to work their full hours. Counsel for Plaintiffs was less  
13 interested. He made meritless objections to the City's interrogatories, fully failed to respond to  
14 other requests, and violated Court-imposed deadlines. *See* Dkt. 180, at 2–3; Dkt. 205, at 2.  
15 Sanctions were imposed. The sanctions decision ordered certain facts sought by the City  
16 established in a manner adverse to Plaintiffs. *See* Dkt. 180 at 8–11. It also limited the evidence  
17 Plaintiffs could use to establish entitlement to relief to the deposition testimony of the seven  
18 nurses that were deposed. *See id.* at 11.

## 19 II. LEGAL STANDARD

20 Under Federal Rule of Civil Procedure 56, summary judgment is appropriate if “there is no  
21 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”  
22 Fed. R. Civ. P. 56(a). The moving party “bears the initial responsibility of informing the district  
23 court of the basis for its motion[] and identifying those portions of [the record] which it believes  
24 demonstrate the absence of a genuine issue of material.” *Celotex Corp. v. Catrett*, 477 U.S. 317,  
25 323 (1986). “The non-moving party must then offer evidence of such a caliber that ‘a fair-minded  
26 jury could return a verdict for the [nonmoving party] on the evidence presented. The mere  
27 existence of a scintilla of evidence in support of the [non-moving party’s] position will be

1 insufficient.”” *United States v. Wilson*, 881 F.2d 596, 601 (9th Cir. 1989) (quoting *Anderson v.*  
2 *Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). “The deciding court must view the evidence,  
3 including all reasonable inferences, in favor of the non-moving party.” *Reed v. Lieurance*, 863  
4 F.3d 1196, 1204 (9th Cir. 2017).

### 5 III. DISCUSSION

6 The sanctions order requires summary judgment for the City. That order limited the  
7 evidence available to Plaintiffs to the deposition testimony of the seven opt-in nurses that  
8 appeared for deposition: Tatyana Litvinova, Grace Bondoc, Santiago Hayo, Ryan Hood, Romula  
9 Adiao, Jacqueline Savage, and Virginia Bryant.

10 Each of those seven nurses testified that they were never denied the opportunity to work  
11 their full-time equivalent hours. *See* Dkt. 197, Spellberg Decl., Ex. J (Litvinova Depo. Tr.), at  
12 27:25–28:6 (“Q: It’s true, is it not, that every time you’re scheduled for the 48 hours in two weeks,  
13 you always have that opportunity to work the 48 hours, right? . . . A: yes.”); *id.*, Ex. B (Bondoc  
14 Depo. Tr.), at 22:16–23:16; *id.*, Ex. M (Hayo Depo. Tr.), at 21:23–22:2 (“Q: Isn’t it true, Mr.  
15 Hayo, that when you were working at the jail, you were always paid -- or you also accounted for  
16 80 hours in a two-week time period? A. Correct.”); *id.*, Ex. H (Hood Depo. Tr.), at 26:23–28:22;  
17 *id.*, Ex. A (Adiao Depo. Tr.), at 15:8–16:21; *id.*, Ex. N (Savage Depo. Tr.), at 21:23–24:14; *id.*,  
18 Ex. R (Bryant Depo. Tr.), at 31:3–32:16. The deposition testimony thus establishes that Plaintiffs  
19 were salaried employees not subject to the FLSA’s overtime provisions.

20 Even if a jury were inclined to think the deposition testimony was caused by a nurse’s  
21 faulty or incomplete recollection, the sanctions order precludes Plaintiffs from filing in the gaps in  
22 a manner that shows the City’s liability. It established, for instance, that Plaintiffs are “unaware of  
23 any facts, documents or persons with information to support” the claim that “the City denied a  
24 nurse the opportunity to work a regularly scheduled shift.” Dkt. 180, at 10. There is simply no  
25 available evidence from which Plaintiffs can establish a dispute of fact.

26 Seeking to avoid that result, Plaintiffs rely heavily on the Ninth Circuit’s decision  
27 reversing the prior grant of summary judgment and remanding the case for resolution of the

1 outstanding factual disputes. As explained, the Ninth Circuit identified 72 pay periods in which a  
2 nurse was paid less than her regular hours would have commanded. However, under the sanctions  
3 order, Plaintiffs have constructively admitted that they are not aware of any evidence  
4 demonstrating that these shortfall periods were the result of the City denying the nurse the ability  
5 to work her regular hours. *See* Dkt. 180, at 9–10 (“The Court orders under Rule 37(b)(2)(A)(ii)  
6 that plaintiffs are prohibited from making any claim that the 72 pieces of missing data show a  
7 violation of Section 710.”). In effect, Plaintiffs have admitted that there is no dispute of fact,  
8 notwithstanding the shortfall periods present in the City’s expert report.<sup>1</sup>

9 Perhaps recognizing their inability to show a factual dispute, Plaintiffs turn to a legal  
10 argument. They contend that a bottom-up compensation scheme in which nurses are compensated  
11 for hours worked (or for hours spent out of a leave bank) is inherently hour based, not salary  
12 based. That argument is foreclosed by the Ninth Circuit’s decision reversing the prior grant of  
13 summary judgment. The panel explained the public accountability principle, codified in 29 C.F.R.  
14 § 541.710, permits a public employer to “use a bottom-up approach that counts the number of  
15 hours actually worked, multiplies them by [the applicable] hourly rate, and makes any necessary  
16 adjustments” for hours the employee did not work for personal reasons. *Sillaway*, 117 F.4th at  
17 1080.

18 Plaintiffs certainly gesture at something intuitively uncomfortable about considering an  
19 employee paid only for hours she works to be salaried. However, the panel in *Sillaway* explained  
20 that this seemingly strange result is “the product of a long history of political and constitutional  
21 controversy and policy disagreement in applying the FLSA to state and local employers.” 117  
22 F.4th at 1080. During the period in which the FLSA did not apply to state and local governments,  
23 many public employers compensated their employees in accordance with public accountability  
24 laws. *See id.* Under the then-prevailing regulations, those public accountability laws would have

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27 <sup>1</sup> For this reason, whether the City’s expert report successfully reconciles all the shortfall pay  
28 periods is irrelevant in this case.

1 taken state and local employees out of the professional-capacity exemption. *See id.* Thus, when the  
2 Supreme Court reversed course and permitted the FLSA’s wage-and-hour provisions to apply to  
3 state and local governments in *Garcia v. San Antonio Transit*, 469 U.S. 528 (1985), those state and  
4 local governments became concerned that they would either have to defy their public  
5 accountability laws or forgo the benefits of the professional-capacity exemption. *See id.* at 1081.

6 To alleviate that concern, the Secretary incorporated the public accountability principle  
7 into the FLSA’s implementing regulations. *See Sillaway*, 117 F.4th at 1080. Therefore—strange as  
8 it may seem—the City can deduct a nurses pay down to the minute so long as the time not worked  
9 was caused by the nurse, all without losing the benefit of the professional-capacity exemption. In  
10 other words, the City must merely “guarantee[ the nurses] the opportunity to work the hours  
11 corresponding to their full-time equivalency every week.” *Id.* at 1077.

12 The remainder of Plaintiffs’ arguments are difficult to understand. They contend that a  
13 newly enacted provision of California law “appears to divest consolidated charter cities and  
14 counties, including [the City], of all authority to enact or enforce ordinances related to wages or  
15 compensation for covered health care facility employees,” which in Plaintiffs’ view, raises an  
16 Article III standing problem. Dkt. 207 at 3–4. Standing, however, is a barrier to a plaintiff bringing  
17 a suit in federal court, not to a defendant defending that suit.

18 Plaintiffs further argue that the federal definition of “salary” under the FLSA preempts any  
19 less employee-friendly definition used by local employers. *See Dkt. 207*, at 4. That is both true  
20 and irrelevant. Throughout this litigation, the City has attempted to demonstrate compliance with  
21 the salary basis test as defined in federal law; it has not offered a different definition of “salary”  
22 that it claims trumps federal law.

23 The remainder of Plaintiffs’ submission is responsive to the City’s separate motion to  
24 decertify the collective action. There is no need to address those arguments because the City’s  
25 decertification motion is mooted by the favorable grant of summary judgment.

#### 26 IV. CONCLUSION

27 For the foregoing reasons, the City’s motion for summary judgment (Dkt. 197) is granted.

28 ORDER GRANTING SUMMARY JUDGMENT  
CASE No. 18-cv-01494-RS

1 The City's motion to decertify the collective action (Dkt. 198) and to exclude the Plaintiffs' expert  
2 (Dkt. 196) are moot. As previously noted, nothing in this order shall have any effect in the related  
3 *Sillaway* case.

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5 **IT IS SO ORDERED**

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7 Dated: November 17, 2025



8  
9 RICHARD SEEBORG  
10 Chief United States District Judge

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United States District Court  
Northern District of California